

Comment of Timothy F. Haley, Seyfarth Shaw LLP

My thanks for putting on the very helpful Public Workshop on Competition in Labor Markets. At the end of the workshop and on the DOJ website, you invite comments on this topic. The comments below are provided in response to that invitation. The positions taken in these comments are my own, and are not necessarily shared by my firm, any other attorney at my firm or any clients of the firm.

I am an attorney with Seyfarth Shaw LLP, and though not exclusively, I have been practicing antitrust law since the early 1980s. In that practice I have, among other things, represented employers in class actions involving claims of wage suppression resulting from alleged: (i) no-poach agreements; wage-fixing agreements; and agreements to unlawfully share wage information. I have also counseled and represented clients in matters involving the labor exemption to the antitrust laws and am a co-author of a chapter on the labor exemption in the Illinois Institute for Continuing Legal Education book entitled, *Labor Law: Unfair Labor Practices* 2017 Edition.

During the workshop Dr. Marshall Steinbaum, an economist, and Mr. Randy Stutz, an attorney, speaking about the franchisor no-poach cases, argued that an adverse effect on the employment market cannot be justified by procompetitive effects in a commercial market. Mr. Samuel Weglein, expressed his disagreement with this position as an economist, but I do not recall anyone pushing back from the legal perspective. With respect, I think this argument is not supported by current law under Section 1 of the Sherman Act.

Mr. Stutz referenced *United States v. Philadelphia National Bank*, 374 US 321 (1963) (presumably at 371), and the Horizontal Merger Guidelines at footnote 14 as legal support for his position. But that authority deals with Section 7 of the Clayton Act, not Section 1 of the Sherman Act. Those two statutes have completely different legal standards and are designed to address completely different concerns. Also, neither of these authorities involve the employment market.

Plaintiffs in at least one of the franchise cases have cited *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), for this argument. In *Topco* the Supreme Court wrote that competition may not “be foreclosed with respect to one sector of the economy because private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy”. But that statement is dictum and is not controlling. See *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1157, n.11 (9th Cir. 2003) (“[P]erhaps that language from *Topco* is not controlling because it is a dictum or incomplete or obsolete....”). And it has not been recognized as creating a general rule that procompetitive benefits in one market cannot justify anticompetitive restraints in another. As the First Circuit noted in *Sullivan v. National Football League*, 34 F.3d 1091, 1111-12 (1st Cir. 1994): “[S]everal courts, including this Circuit, have found it appropriate in some cases to balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets.... [W]e can draw at least one general conclusion from the case law at this point: courts should generally give

a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices” (internal citations omitted).

Moreover, no-poach clauses and restrictive covenants have always been justified through procompetitive benefits in a non-labor market even when they cause some restraint in the labor market. See, e.g., *Eichorn v. AT & T Corp.*, 248 F.3d 131, 144-48 (3d Cir. 2001) (and cases cited therein) (no-hire agreement executed in connection with sale of a business was ancillary and found lawful under the Sherman Act because it enabled the purchaser to obtain the value of the goodwill for which it had paid, characterizing a no-hire agreement as a “common law covenant not to compete”).

Again, thanks for putting on the workshop.